

No. 20-6786

IN THE
Supreme Court of the United States

ERICA YVONNE SHEPPARD,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS
DIVISION,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**BRIEF FOR *AMICI CURIAE* DOMESTIC
VIOLENCE ADVOCATES IN SUPPORT OF
PETITIONER**

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CASES:	
<i>Commonwealth v. Dillon</i> , 598 A.2d 963 (Pa. 1991).....	19
<i>United States v. Brown</i> , 7 F.3d 648 (7th Cir. 1993)	18
<i>United States v. Frazier</i> , 387 F.3d 1244 (11th Cir. 2004)	18
OTHER AUTHORITIES:	
Alaska Children’s Trust, Adverse Childhood Experiences (ACEs) (page last visited Feb. 4, 2021), <a href="https://www.alaskachildren-
strust.org/aces">https://www.alaskachildren- strust.org/aces	8
Sharon Angella Allard, <i>Rethinking Battered Woman Syndrome: A Black Feminist Per- spective</i> , 1 UCLA Women’s L.J. 191 (1991)	17
Robert F. Anda et al., <i>The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology</i> , 256 Eur. Archives Psychiatry & Clinical Neuroscience 174 (2006).....	7
Margaret E. Bell et al., <i>Variations in Help- Seeking, Battered Women’s Relationship Course, Emotional Well-Being, and Experi- ences of Abuse Over Time</i> , 33 Psych. Women Q. 149 (2009).....	16

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David W. Brown et al., <i>Adverse Childhood Experiences and the Risk of Premature Mortality</i> , 37 Am. J. Preventative Med. 389 (2009)	7
Sarah M. Buel, <i>Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct</i> , 26 Harv. Women's L.J. 217 (2003)	13
Sarah M. Buel, <i>Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay</i> , 28 Co. Lawyer 19 (Oct. 1999)	16
Clara Passmann Carr et al., <i>The Role of Early Life Stress in Adult Psychiatric Disorders: A Systematic Review According to Childhood Trauma Subtypes</i> , 201 J. Nervous & Mental Disease 1007 (2013).....	7
Stephan Collishaw et al., <i>Resilience to Adult Psychopathology Following Childhood Maltreatment: Evidence from a Community Sample</i> , 31 Child Abuse & Neglect 211 (2007)	7
Rhonda Copelon, <i>Recognizing the Egregious in the Everyday: Domestic Violence as Torture</i> , 25 Colum. Hum. Rts. L. Rev. 291 (1994)	12
Kimberlé Crenshaw, <i>Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color</i> , 43 Stan. L. Rev. 1241 (1991)	17

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
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Bernice B. Donald & Erica Bakies, <i>A Glimpse Inside the Brain's Black Box: Understanding the Role of Neuroscience in Criminal Sentencing</i> , 85 Fordham L. Rev. 481 (2016).....	10
Mary Ann Dutton, <i>Pathways Linking Intimate Partner Violence and Posttraumatic Disorder</i> , 10 Trauma, Violence & Abuse 211 (July 2009)	12
Mary Ann Dutton & Lisa Goodman, <i>Coercion in Intimate Partner Violence: Toward a New Conceptualization</i> , 52 Sex Roles 743 (Apr. 15, 2005).....	13
Rebecca Epstein, Jamilia J. Blake & Thalia González, Ctr. on Poverty & Ineq., Geo. Law, <i>Girlhood Interrupted: The Erasure of Black Girls' Childhood</i> (June 2017).....	17
Charles Patrick Ewing & Moss Aubrey, <i>Battered Woman and Public Opinion: Some Realities Abuse the Myths</i> , 2 J. Fam. Violence 257 (1987)	14

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Vincent J. Felitti et al., <i>Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study</i> , 14 Am. J. Preventative Med. 245 (1998).....	7, 9
Zanita E. Fenton, <i>Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence</i> , 8 Colum. J. Gender & L. 1 (1998)	17
William H. George & Lorraine J. Martínez, <i>Victim Blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism</i> , Psych. Women Q. (Mar. 15, 2002).....	17
Miriam S. Gohara, <i>In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing</i> , 45 Am. J. Crim. L. 1 (2018)	10
Jill Goldman et al., Off. on Child Abuse & Neglect, U.S. Dep’t of Health & Hum. Servs., <i>A Coordinated Response to Child Abuse and Neglect: The Foundation of Practice</i> (2003)	6, 7
Lawrence A. Greenfield et al., Bureau of Just. Stats., U.S. Dep’t of Just., <i>Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends</i> (Mar. 1998)	15

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Jennifer Greif Green et al., <i>Childhood Adversities and Adult Psychiatric Disorders in the National Comorbidity Survey Replication I: Associations with First Onset of DSM-IV Disorders</i> , 67 <i>Archive Gen. Psychiatry</i> 113 (2010)	7
William W. Harris et al., <i>In the Best Interests of Society</i> , 48 <i>J. Child Psych. & Psychiatry</i> 392 (2007)	6
Tracy Bennett Herbert, Roxane Cohen Silver & John H. Ellard, <i>Coping with an Abusive Relationship: How and Why do Women Stay?</i> , 53 <i>J. Marriage & Fam.</i> 311 (1991)	14, 15
Cathy Humphreys & Ravi K. Thiara, <i>Neither Justice nor Protection: Women's Experiences of Post-Separation Violence</i> , 25 <i>J. Soc. Welfare & Fam. L.</i> 195 (2003)	16
Y. Ito et al., <i>Increased Prevalence of Electrophysiological Abnormalities in Children with Psychological, Physical, and Sexual Abuse</i> , 5 <i>J. Neuropsychiatry & Clinical Neurosciences</i> 401 (Nov. 1993)	9
Michael P. Johnson, <i>Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women</i> , 57 <i>J. Marriage & Fam.</i> 283 (1995)	12
C. Henry Kempe et al., <i>The Battered-Child Syndrome</i> , 181 <i>J. Am. Med. Assoc.</i> 17 (1962)	6

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	<u>Page(s)</u>
Ronald C. Kessler et al., <i>Childhood Adversities and Adult Psychopathology in the WHO World Mental Health Surveys</i> , 197 Brit. J. Psychiatry 378 (2010)	7
Elizabeth D. Krause et al., <i>Avoidant Coping and PTSD Symptoms Related to Domestic Violence Exposure: A Longitudinal Study</i> , 21 J. Traumatic Stress 83 (2008)	12
K. A. McLaughlin et al., <i>Childhood Adversity, Adult Stressful Life Events, and Risk of Past-Year Psychiatric Disorder: A Test of the Stress Sensitization Hypothesis in a Population-Based Sample of Adults</i> , 40 Psych. Med. 1647 (2010).....	7
<i>Myths & Facts about Domestic Violence</i> , TexasLawHelp.org (page last visited Feb. 4, 2021), https://texaslawhelp.org/article/myths-and-facts-about-domestic-violence	15
Nat'l Ctr. for Inj. Prevention & Control, Ctrs. for Disease Control & Prevention, About the CDC-Kaiser ACE Study (page last reviewed Apr. 13, 2020), https://www.cdc.gov/violenceprevention/aces/about.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Facestudy%2Fabout.html	8
Nat'l Rsch. Council, <i>Understanding Child Abuse and Neglect</i> (1993)	7

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Charles B. Nemeroff, <i>Paradise Lost: The Neurobiological and Clinical Consequences of Child Abuse and Neglect</i> , 89 <i>Neuron</i> 892 (Mar. 2, 2016)	8
Osagie K. Obasogie, <i>Anything but a Hypocrite: Interactional Musings on Race, Colorblindness, and the Redemption of Strom Thurmond</i> , 18 <i>Yale J.L. & Feminism</i> 451 (2006)	17
Batya Yisraela Rubenstein, <i>The Effects of Racial Bias on Perceptions of Intimate Partner Violence Scenarios</i> (June 4, 2016) (B.Y.R. thesis, University of South Florida) (on file with University of South Florida Graduate Theses and Dissertations), <i>available at</i> http://scholarcommons.usf.edu/etd/6372	14
Kate M. Scott et al., <i>Childhood Maltreatment and DSM-IV Adult Mental Disorders: Comparison of Prospective and Retrospective Findings</i> , 200 <i>Brit. J. Psychiatry</i> 469 (2012)	7
Martin H. Teicher et al., <i>The Effects of Childhood Maltreatment on Brain Structure, Function and Connectivity</i> , 17 <i>Nature Revs. Neuroscience</i> 652 (Oct. 2016)	9
The APSAC Handbook on Child Maltreatment (John E.B. Myers ed., 3d ed. 2011)	8

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Cathy Spatz Widom et al., <i>Childhood Victimization and Lifetime Revictimization</i> , 32 Child Abuse & Neglect 785 (2008)	9
Nancy Wolff & Jing Shi, <i>Childhood and Adult Trauma Experiences of Incarcerated Persons and Their Relationship to Adult Behavioral Health Problems and Treatment</i> , 9 Int'l J. Env't Rsch. & Pub. Health 1908 (2012), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3386595/pdf/ijerph-09-01908.pdf	10
Nancy Wolff, Jing Shi & Jane A. Siegel, <i>Patterns of Victimization Among Male and Female Inmates: Evidence of an Enduring Legacy</i> , 24 Violence & Victims 469 (2009)	10
Niwako Yamawaki et al., <i>Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship With Her Abuser, and the Decision to Return to Her Abuser</i> , 27 J. Interpersonal Violence 3195 (2012)	15

INTERESTS OF *AMICI CURIAE*¹

The *University of Texas School of Law Domestic Violence Clinic* provides parole advocacy and comprehensive civil legal services to low-income domestic violence survivors.

The *National Center on Domestic and Sexual Violence* seeks to enhance prevention and intervention in domestic and sexual violence through training, consulting and advocacy; to educate the public, professionals and policy makers, including the courts, about the impact of domestic and sexual violence; and to influence policy and practice while challenging potential outcomes that tend to blame or re-victimize survivors of domestic and sexual violence.

The *National Clearinghouse for the Defense of Battered Women* works to ensure justice for victims of battering charged with crimes, where a history of abuse is relevant to the defendant's legal claim or defense. The National Clearinghouse provides technical expertise to victim defendants, defense attorneys, anti-domestic violence advocates, expert witnesses, and others. The National Clearinghouse works with defense teams to help factfinders understand the ways in which evidence of the defendant's experience of abuse may help explain behavior, reduce culpability and/or mitigate punishment.

¹ All parties were notified of *amici curiae*'s intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

The *Texas Advocacy Project* (TAP) works to empower the public and survivors of domestic and dating violence, sexual assault, and stalking in Texas through free legal services, access to the justice system, and education and prevention. Through trainings and trial advocacy, TAP seeks to increase understanding of the power of coercive control: how it can work in conjunction with physical violence or threats of physical violence, and be even more dangerous.

The *Texas Council on Family Violence* (TCFV) is the statewide coalition with over 1000 members including family violence service providers, allied programs and survivors working to promote safe and healthy relationships by supporting service providers, facilitating strategic prevention efforts, and creating opportunities for freedom from family violence. In promoting safe and healthy relationships, TCFV advocates for the well-being of all Texans and is aware of the unfortunate link between family violence, trauma, and traumatic brain injury that affects survivors all too often. We also must acknowledge the role of coercive control—when one uses power to exert a series of threatening or abusive acts to maintain control of a victim—that was so clearly at play in this situation. The Texas Council recognizes the increased vulnerability and need for specific response and protection for survivors with multiple, severe and chronic trauma histories.

Ujima Inc., The National Center on Violence Against Women in the Black Community (Ujima, Inc.), a project of the DC Coalition Against Domestic Violence, was founded in 2015 and is located in the District of Columbia. The mission of Ujima, Inc. is to respond to and end domestic, sexual, and community violence in

the Black community through research; public awareness and community engagement; resource development; education and outreach for comprehensive, trauma-informed services for survivors; and public policy initiatives.

Amici have a shared expertise on the trauma experienced by survivors of intimate partner violence and sexual assault, and a vested interest in education and advocacy on the long-term effects on survivors.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The first 19 years of Erica Yvonne Sheppard's life were marked by unending physical, sexual, and psychological abuse at the hands of nearly every adult in her life: her mother, grandmother, babysitters, boy-friends, husband, and acquaintances. The jury that sentenced Erica to die, however, heard little about the myriad traumas Erica endured, and nothing about the lasting impact of those experiences.

Abundant scholarly research shows that the trauma of child abuse and intimate partner violence has a lasting psychological impact on survivors. Erica's lived experience confirms that impact. Expert evidence shows that the cumulative trauma Erica experienced caused posttraumatic stress disorder, dissociative disorder, and major depression, and limited her cognitive abilities to those of a fourteen-year old. And corroborating testimony from Erica's family, friends, and police reports confirms the severity and longevity of the abuse she experienced from caregivers, family members, and romantic partners. But because of trial counsel's failure to investigate, the bulk of this evidence did not come to light until after Erica's trial, during post-conviction proceedings.

Erica’s trial counsel—despite general awareness of her history of abuse—made virtually no effort to develop this mitigating evidence or present it to the jury. Instead, he put on a paltry 71-minute mitigation case in which he claimed that Erica suffered from depression and mood swings. This was wholly insufficient to explain to the jury the impact Erica’s history of abuse had on her cognitive functioning.

Nevertheless, the TCCA and Fifth Circuit concluded that the robust evidence of abuse and expert testimony explaining its lasting effects on Erica that trial counsel neglected to investigate or present was “cumulative” of the meager mitigation case put on at trial. But evidence of Erica’s childhood abuse and its psychological impact is materially different than indications she suffered from depression. And evidence of the intimate partner violence Erica experienced at the hands of her husband and the father of her child demonstrates that she was particularly susceptible to coercion. On both of these issues, expert testimony and corroborating evidence was particularly critical given the nature of Erica’s trauma and common misperceptions about abuse and domestic violence. Because the jury was never made aware of this critical information, it did not have the information necessary to adequately evaluate Erica Sheppard’s moral culpability.

ARGUMENT**I. EVIDENCE PRESENTED ON POST-CONVICTION OF THE CHILDHOOD PHYSICAL AND SEXUAL ABUSE AND INTIMATE PARTNER VIOLENCE ERICA EXPERIENCED WAS NOT CUMULATIVE OF TRIAL EVIDENCE.****A. Erica's Significant Childhood Abuse Has Particular Mitigating Significance.**

Trial counsel was aware—before trial—of the horrific abuse Erica experienced throughout her life. He nevertheless failed to investigate this potential mitigation theory, gather corroborating evidence, or secure assistance from experts who could have properly evaluated the effect of this abuse on Erica. Pet. 2. Because of these failures, the jury never learned that Erica suffered from posttraumatic stress disorder, major depression, and brain impairments so severe that she has the functional brain development of a fourteen year old. *Id.* at 5-11. Trial counsel's suggestion to the jury that Erica suffered from "depression and mood swings" is a gross minimization of the trauma she endured and the traumatized mental state at the time of the offense. App. 25. As detailed below, and as Judge King recognized in her dissent, the mitigation case the jury heard was different in kind—not just degree—than the evidence adduced on post-conviction. *Id.* at 23-24.

1. Evidence developed on post-conviction shows that Erica's childhood was marked by repeated abuse by numerous adults responsible for her care. At age five, she was repeatedly sexually molested. Pet. 5-6. Her babysitter forced Erica to perform oral sex on her boyfriend, while Erica's seven-year old brother Jonathan

was forced to watch. *Id.* The same babysitter also hit Erica and Jonathan and whipped them with electrical cords. *Id.* at 6. Erica and Jonathan reported the abuse to their mother and grandmother, who did not believe them and returned the children to their abusers. *Id.* Erica suffered further abuse by her mother, who beat Erica with belts and wooden boards, and once strangled her with a telephone cord. *Id.* Her mother's romantic partners likewise regularly beat Erica. *Id.* Even after she fled her mother's abusive home as a teenager, Erica was still not safe. Erica was sexually assaulted at knifepoint while living on the streets. *Id.*

2. A mountain of scientific and medical research demonstrates that Erica's experience as a child victim of rape and physical assault rendered her especially vulnerable to victimization as an adult. William W. Harris et al., In the Best Interests of Society, 48 J. Child Psych. & Psychiatry 392, 392 (2007) (reporting that "children's responses to trauma can render them simultaneously over-reactive, helpless and immobilized – whether as victims of abuse [or] witnesses to domestic and community violence" with the potential for "long-lasting changes in brain anatomy and physiology."). Literally thousands of empirical studies have documented that victims of childhood maltreatment suffer a range of deleterious psychological effects including posttraumatic stress disorder, suicidal behavior, severe depression, and other psychological disorders.² Abused children may exhibit impairments

² C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. Am. Med. Assoc. 17 (1962); Jill Goldman et al., Off. on Child Abuse & Neglect, U.S. Dep't of Health & Hum. Servs., *A Coordinated Response to Child Abuse and Neglect: The Foundation of*

along with psychological and physical indices, such as emotional, social, and cognitive challenges at home, at

Practice 35-39 (2003); Nat'l Rsch. Council, *Understanding Child Abuse and Neglect* 208-252 (1993); Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology*, 256 *Eur. Archives Psychiatry & Clinical Neuroscience* 174, 180 (2006) (summarizing findings of psychological symptomatology and substance abuse in populations with exposure to maltreatment in childhood); Stephan Collishaw et al., *Resilience to Adult Psychopathology Following Childhood Maltreatment: Evidence from a Community Sample*, 31 *Child Abuse & Neglect* 211, 212, 223-224 (2007) (reporting higher rates of recurrent depression, suicidal behavior, posttraumatic stress disorder, and substance abuse in adults who had experienced child maltreatment); David W. Brown et al., *Adverse Childhood Experiences and the Risk of Premature Mortality*, 37 *Am. J. Preventative Med.* 389 (2009); Clara Passmann Carr et al., *The Role of Early Life Stress in Adult Psychiatric Disorders: A Systematic Review According to Childhood Trauma Subtypes*, 201 *J. Nervous & Mental Disease* 1007 (2013); Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 *Am. J. Preventative Med.* 245 (1998); Jennifer Greif Green et al., *Childhood Adversities and Adult Psychiatric Disorders in the National Comorbidity Survey Replication I: Associations with First Onset of DSM-IV Disorders*, 67 *Archives Gen. Psychiatry* 113 (2010); Ronald C. Kessler et al., *Childhood Adversities and Adult Psychopathology in the WHO World Mental Health Surveys*, 197 *Brit. J. Psychiatry* 378 (2010); K. A. McLaughlin et al., *Childhood Adversity, Adult Stressful Life Events, and Risk of Past-Year Psychiatric Disorder: A Test of the Stress Sensitization Hypothesis in a Population-Based Sample of Adults*, 40 *Psych. Med.* 1647 (2010); Kate M. Scott et al., *Childhood Maltreatment and DSM-IV Adult Mental Disorders: Comparison of Prospective and Retrospective Findings*, 200 *Brit. J. Psychiatry* 469 (2012).

school, and in their communities.³ The Centers for Disease Control sponsored longitudinal studies on Adverse Childhood Experiences that produced scores of scholarly articles on the findings that child maltreatment can result in many severe, adverse, and cumulative mental health and medical conditions over time.⁴ The studies focused on ten Adverse Childhood Experiences that included child abuse (physical, sexual, and psychological), neglect (physical and psychological), parental relationship discord (domestic violence and verbal abuse), and household members' disfunction (mental illness, substance abuse, or criminal record). Evidence readily available at the time of Erica's trial documented that she was repeatedly subjected to all ten categories of Adverse Childhood Experiences—putting her at the highest risk levels (and the expert

³ Charles B. Nemeroff, *Paradise Lost: The Neurobiological and Clinical Consequences of Child Abuse and Neglect*, 89 *Neuron* 892 (Mar. 2, 2016). For more specific discussion of the types of difficulties that may follow from different forms of child maltreatment, see, for example, chapters in Parts II, III, and IV of *The APSAC Handbook on Child Maltreatment*. The APSAC Handbook on Child Maltreatment 101-322 (John E.B. Myers ed., 3d ed. 2011).

⁴ Alaska Children's Trust, Adverse Childhood Experiences (ACEs) (page last visited Feb. 4, 2021), <https://www.alaskachildrenstrust.org/aces> ("More than 17,000 Health Maintenance Organization (HMO) members . . . chose to provide detailed information about their childhood experience of abuse, neglect, and family dysfunction. To date, more than 50 scientific articles have been published."); see also Nat'l Ctr. for Inj. Prevention & Control, Ctrs. for Disease Control & Prevention, About the CDC-Kaiser ACE Study (page last reviewed Apr. 13, 2020), https://www.cdc.gov/violenceprevention/aces/about.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Facestudy%2Fabout.html.

evidence adduced on post-conviction confirms that these risks materialized in Erica's case).

Children that suffer multiple forms of Adverse Childhood Experiences are more likely to suffer cumulative negative impacts. Research demonstrates that the more Adverse Childhood Experiences a child suffers, the greater risk and occurrence of serious mental health and medical challenges into adulthood.⁵ Moreover, researchers have consistently found that children who suffered more than one type of abuse (physical and sexual) or neglect faced amplified risks of successive victimization and attendant traumas.⁶ Indeed, neuroscience experts have conducted thousands of empirical studies documenting the link between child abuse and impaired brain development, structure, and function that can trigger a cascade of adverse neurobiological consequences long into adulthood.⁷ Children that face danger and adversity early in their lives adopt survival strategies and continue to apply those strategies throughout their lifetime due to the compromised deficient cognitive development.⁸ It is beyond

⁵ Felitti, *supra* note 2, at 249-250.

⁶ Cathy Spatz Widom et al., *Childhood Victimization and Lifetime Revictimization*, 32 *Child Abuse & Neglect* 785, 791, 793 (2008).

⁷ Martin H. Teicher et al., *The Effects of Childhood Maltreatment on Brain Structure, Function and Connectivity*, 17 *Nature Revs. Neuroscience* 652, 652 (Oct. 2016) (citing Y. Ito et al., *Increased Prevalence of Electrophysiological Abnormalities in Children with Psychological, Physical, and Sexual Abuse*, 5 *J. Neuropsychiatry & Clinical Neurosciences* 401 (Nov. 1993)).

⁸ Udo Dannlowski et al., *Limbic Scars: Long-Term Consequences of Childhood Maltreatment Revealed by Functional and*

dispute that more frequent and severe childhood abuse causes exponentially greater trauma and attendant adverse manifestations.⁹ Because of the aggregated effect of frequent trauma, evidence of Erica's repeating traumas could not have been cumulative. Each traumatic event multiplied the adverse psychological effect of the previous traumatic events.

3. Expert testimony developed on post-conviction demonstrates that the trauma Erica experienced throughout her childhood negatively impacted her "thoughts, beliefs, emotions and behaviors," and that she suffers from major depressive disorder, posttraumatic stress disorder, and dissociative disorder. Pet. 9-10. The abuse she suffered has significantly impaired her cognitive functioning; experts concluded that she has the mental age equivalent of a fourteen

Structural Magnetic Resonance Imaging, 71 *Biological Psychiatry* 286 (2012).

⁹ Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 *N.C. L. Rev.* 1143 (1999); Bernice B. Donald & Erica Bakies, *A Glimpse Inside the Brain's Black Box: Understanding the Role of Neuroscience in Criminal Sentencing*, 85 *Fordham L. Rev.* 481 (2016); Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 *Am. J. Crim. L.* 1 (2018); Nancy Wolff & Jing Shi, *Childhood and Adult Trauma Experiences of Incarcerated Persons and Their Relationship to Adult Behavioral Health Problems and Treatment*, 9 *Int'l J. Env't Rsch. & Pub. Health* 1908, 1909 (2012) [hereinafter Wolff & Shi, *Childhood and Adult Trauma Experiences*], available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3386595/pdf/ijerph-09-01908.pdf>; Nancy Wolff, Jing Shi & Jane A. Siegel, *Patterns of Victimization Among Male and Female Inmates: Evidence of an Enduring Legacy*, 24 *Violence & Victims* 469, 477 (2009) [hereinafter Wolff, Shi, & Siegel, *Patterns of Victimization*].

year old. *Id.* 7-8; *see also* App. 187 (explaining childhood abuse, neglect, unsafe environment and inadequate parenting are known to be associated with immature development of brain function). Such psychological disorders are consistent with the horrific childhood maltreatment Erica suffered beginning at least at age three and continuing throughout her childhood. Pet. 7-11, 26; App. 31-32.

Erica's trial counsel acknowledged that there were "things about Erica Sheppard that [he] thought only a . . . medical doctor[,] psychologist, or psychiatrist could talk about." Pet. 3 (internal quotation marks omitted). But he neglected to retain such an expert, opting instead to simply opine to the jury that Erica suffered from some mental health problems. Counsel's opinion—easily disparaged as the argument of an advocate—was no substitute for expert testimony. That is particularly so given how much weight juries place on expert testimony, especially when it comes to understanding why victims may behave in certain ways and are particularly vulnerable to further victimization. *See infra* Section II.

B. The Intimate Partner Violence Erica Experienced Made Her Further Vulnerable to Manipulation.

Erica continued to suffer relentless and brutal abuse into her adolescence, now at the hands of her husband. This abuse compounded the trauma stemming from her childhood abuse and made her particularly vulnerable to manipulation.

1. Erica's husband and the father of her third child, Jerry Bryant, repeatedly beat her so severely that she would lose consciousness. Pet. 6. He regularly beat her so badly that he would leave her with serious

injuries—most dramatically when he dented her skull. *Id.* Bryant frequently threatened Erica with guns and knives, and he ran her off the road when she was pregnant with their child. *Id.*

2. Abundant research shows the physical and psychological impacts of domestic violence, including PTSD, shame, anxiety, depression, and low self-esteem—with revictimization only magnifying these mental health consequences.¹⁰

Researchers have concluded that unrelenting domestic violence like Erica suffered is akin to torture,¹¹ and often leaves victims with an overwhelming sense of hopelessness and passivity¹² that keeps victims in a chronic state of psychological entrapment and terror.

Expert evidence adduced during post-conviction proceedings confirms that Erica experienced these well-documented effects. Erica’s learned experience from the intimate partner violence and sexual assault she experienced was that fighting back resulted in increased risk of harm. App. 261-262. This rendered her particularly vulnerable to, and impaired her ability to resist, threats of violence—from anyone, not just those

¹⁰ Elizabeth D. Krause et al., *Avoidant Coping and PTSD Symptoms Related to Domestic Violence Exposure: A Longitudinal Study*, 21 J. Traumatic Stress 83, 88 (2008); Mary Ann Dutton, *Pathways Linking Intimate Partner Violence and Posttraumatic Disorder*, 10 Trauma, Violence & Abuse 211, 217 (July 2009).

¹¹ See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291 (1994).

¹² Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. Marriage & Fam. 283 (1995).

who had previously abused her—and made her especially susceptible to James Dickerson’s threats that he would harm her or kill her child if she did not assist him in perpetrating the crime that led to Erica’s death sentence.¹³ Expert testimony explaining this trauma-induced vulnerability would have contextualized and explained Erica’s behavior in the face of these threats, and would have supplied powerful mitigating evidence. But because of trial counsel’s failure to investigate, the jury never heard anything like this.

3. Like the evidence of the awful childhood abuse Erica suffered, evidence of the psychological impacts of the intimate partner violence that Erica experienced was not “cumulative” of the evidence presented at trial. This is true both because the jury did not hear any of it, but also because the scientific literature is unanimous that the harm of experiencing many traumas over time is *exponential*, meaning that the jury could not accurately assess that impact from the limited information provided by trial counsel.¹⁴

¹³ Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 Harv. Women’s L.J. 217, 311-312 (2003).

¹⁴ An individual’s vulnerabilities—ranging from cognitive disabilities and mental health problems to childhood abuse and neglect—can dramatically raise the risk that a person will become the victim of abuse or control. See Mary Ann Dutton & Lisa Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 Sex Roles 743, 748 (Apr. 15, 2005) (discussing “creating or exploiting vulnerabilities”).

II. CORROBORATING EVIDENCE AND EXPERT TESTIMONY ARE PARTICULARLY CRITICAL TO EXPLAIN THE IMPACT OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT.

Corroborating evidence, both through eyewitness accounts and expert testimony, is particularly critical to confirm the occurrence of domestic violence and sexual assault and to explain the enduring impacts on a victim's behavior.

Unfortunately, many women who take the courageous step of reporting intimate partner violence are met with disbelief or blame, or their experience is discounted. Multiple studies over the years bear out this phenomenon.¹⁵ Part of the reason victims are not believed is due to the myths surrounding intimate partner violence that continue to be endorsed by the general public. Among the most common myths are that no woman would stay in a relationship if the abuse was as bad as she claims; that battered women are "free to leave" the relationship; and that battered women brought the abuse on themselves and are to blame.¹⁶ However, these myths can be dispelled when

¹⁵ See Batya Yisraela Rubenstein, *The Effects of Racial Bias on Perceptions of Intimate Partner Violence Scenarios* (June 4, 2016) (B.Y.R. thesis, University of South Florida) (on file with University of South Florida Graduate Theses and Dissertations), available at <http://scholarcommons.usf.edu/etd/6372> (discussing many of these studies).

¹⁶ See Charles Patrick Ewing & Moss Aubrey, *Battered Woman and Public Opinion: Some Realities Abuse the Myths*, 2 J. Fam. Violence 257, 263 (1987) ("a substantial proportion of the public (from which juries are drawn) . . . apparently believe that a battered woman can 'simply leave' her batterer."); see also Tracy

context is provided (such as details of the abuse) and an expert on intimate partner violence explains how behavior that may seem counterintuitive actually supports the likelihood of victimization.

An example of behavior that may at first appear counterintuitive is a victim reconciling with her batterer after a serious assault. The general public does not commonly understand why someone would return to an abusive relationship after seemingly escaping it. But if—as was the case for Erica—it were revealed that her batterer told her that if she did not return to him, he would kill her and the children,¹⁷ then the factfinder can see that leaving increased the danger for her and her children. Her returning to her batterer corroborates her victimization.

Further, post-separation proves to be a particularly dangerous time for the great majority of victims of intimate partner violence with a representative study finding that 76 percent of survivors faced on-going

Bennett Herbert, Roxane Cohen Silver & John H. Ellard, *Coping with an Abusive Relationship: How and Why do Women Stay?*, 53 J. Marriage & Fam. 311 (1991); *Myths & Facts about Domestic Violence*, TexasLawHelp.org (page last visited Feb. 4, 2021), <https://texaslawhelp.org/article/myths-and-facts-about-domestic-violence>; Niwako Yamawaki et al., *Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship With Her Abuser, and the Decision to Return to Her Abuser*, 27 J. Interpersonal Violence 3195, 3196-98 (2012).

¹⁷ Statistics show that a woman is most likely to be killed by her intimate partner when she takes steps to end the relationship. See Lawrence A. Greenfield et al., Bureau of Just. Stats., U.S. Dep't of Just., *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* (Mar. 1998).

harm from their abusers. For 36 percent of these women, the abuse not only continued, but intensified over time, and thus created concomitant danger for them and their children.¹⁸ Comparative studies have also consistently found that for women who fled violent relationships, the abuse increased in frequency and severity—thus exacerbating trauma-related symptoms like depression and PTSD as victims face additional safety, child, and financial stressors.¹⁹

Feasible options for escaping domestic violence are typically scarce—particularly for victims like Erica Sheppard who was also grappling with the additional hindrances of poverty, PTSD, mental illness, and cognitive disabilities. As survivors must constantly strategize how to evade, prevent, endure, and escape the abuse, they are forced to engage in a nuanced cost-benefit calculus with fluid, multi-layered risks that require rapid re-assessments.²⁰ Lay people often expect survivors to make many attempts and, ultimately, to flee their abusers regardless of overwhelming obstacles. Like most victims, Erica employed a range of help-seeking behaviors—such as fleeing to family members and a shelter—even with the added challenges of small children in tow, no money,

¹⁸ Cathy Humphreys & Ravi K. Thiara, *Neither Justice nor Protection: Women's Experiences of Post-Separation Violence*, 25 J. Soc. Welfare & Fam. L. 195 (2003).

¹⁹ Margaret E. Bell et al., *Variations in Help-Seeking, Battered Women's Relationship Course, Emotional Well-Being, and Experiences of Abuse Over Time*, 33 Psych. Women Q. 149, 149 (2009).

²⁰ Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 Co. Lawyer 19 (Oct. 1999).

diminished mental capacity, PTSD, and dissociative disorder.

Black women like Erica Sheppard are further doubly disbelieved when they report intimate partner violence.²¹ Stereotypes of Black women contribute to this fact.²² Studies have shown that negative labels continue to persist about Black women.²³ These stereotypes include aggression, dishonesty, and untrustworthiness²⁴—all stereotypes that would increase moral culpability in a capital case. In order to unravel these negative stereotypes, it was imperative that evidence about Erica’s history and character be provided to the jury deciding her fate.

At the time of trial, there was evidence available to trial counsel from Erica’s brother, an eyewitness to the repeated sexual assaults Erica experienced as a child. The jury never heard from him. And while the jury learned that Erica stayed at a shelter, jurors

²¹ Rebecca Epstein, Jamilia J. Blake & Thalia González, Ctr. on Poverty & Ineq., Geo. Law, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood* (June 2017); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 Stan. L. Rev. 1241, 1280-81 (1991); Osagie K. Obasogie, *Anything but a Hypocrite: Interactional Musings on Race, Colorblindness, and the Redemption of Strom Thurmond*, 18 Yale J.L. & Feminism 451 (2006).

²² William H. George & Lorraine J. Martínez, *Victim Blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism*, Psych. Women Q. 110 (Mar. 15, 2002).

²³ Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 Colum. J. Gender & L. 1 (1998).

²⁴ Fenton, *supra* note 23; Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA Women’s L.J. 191 (1991).

never heard about the horrific abuse Erica suffered by her intimate partner, which is what led her to flee with her children to stay at a shelter as a young adult. Such testimony was critical to corroborate and confirm the abuse that Erica experienced.

2. Nor did the jury ever hear from an expert who could have contextualized the abuse Erica suffered and explained the impact it had on her cognitive functioning. Expert testimony would have connected the dots to (i) show how Erica's behavior was consistent with someone who had experienced intimate partner violence (thus further corroborating the abuse), and (ii) explain the impact that history of violence had on young Erica Sheppard and her decision-making (providing powerful mitigation evidence going to Erica's culpability). Expert testimony would have been particularly beneficial given jurors' propensity to assign significant weight to expert testimony. See *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) (observing that "expert testimony may be assigned talismanic significance in the eyes of lay jurors"); *United States v. Brown*, 7 F.3d 648, 655 (7th Cir. 1993) (noting that there is an "aura of special reliability that often surrounds expert testimony, and that jurors may tend to give such testimony undue weight" (internal quotation marks omitted)). There was no excuse for trial counsel's failure to present this evidence to the jury. This was no strategic decision; it was simply a lack of diligence and failure to investigate. Those failures are particularly egregious given that the negative impact of abuse on survivors of domestic violence and child sexual assault, including the use of experts to explain behavior that seems counter-intuitive, was well-documented at the time of Erica's

trial. As one judge wrote in a 1991 case of a woman charged with murder—years before Erica’s trial:

The danger of not presenting expert testimony in these cases is that the jury may well be predisposed to judge the actions and reactions of women in a position that they cannot hope to comprehend. In my view, many jurors who know nothing about battered women simply find the tales of abuse too incredible to believe and thus, refuse to keep an open mind about the rest of the evidence, being convinced that ‘no one would have put up with such abuse therefore it must not be true.’ The testimony of the expert is intended to refute some of the common prejudices against battered women, thus permitting the jury to have a better ability to judge the evidence rationally, rather than judge it on the basis of an erroneous prejudice. Once the jury is educated by an expert about the battered woman syndrome, they are in a much better position to assess the facts before them.²⁵

Here, the jury that sentenced Erica to die did not hear the full legacy of the abuse Erica experienced, let alone the contextualization of expert testimony. Without a full understanding of the mitigating evidence available, the jury did not have the information to truly evaluate Erica’s moral culpability.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

²⁵ *Commonwealth v. Dillon*, 598 A.2d 963, 970-971 (Pa. 1991).

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